HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

JURISDICTION TO ADJUDICATE THE OWNERSHIP OF A SHARE OF STOCK. — A recent decision of the United States Supreme Court brings into the foreground the much-tried question of jurisdiction to adjudicate the ownership of a share of stock in a corporation. *Baker* v. *Baker, Eccles & Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 115.

The court decided that in a suit concerning the right to certain stock in a Kentucky corporation, the Kentucky court was not bound by the Constitution of the United States to extend full faith and credit to a finding of fact made by a Tennessee court in a prior adjudication of the ownership of the stock, where the Tennessee court had the certificates of stock before it, but no jurisdiction over the corporation.[1] Indirectly this is a holding that the decree of the Tennessee court was made without jurisdiction.[2]

Any answer to the question presented to the court in this case depends primarily upon the view adopted as to the nature of a share of corporation stock. One might conceivably regard it as a property interest in the assets of the corporation. Courts have sometimes talked this way,[3]

[1] For a full statement of the facts of the case, see RECENT CASES, p. 516.

[2] There was no question of lack of proper service or notice, so that the decision must go on grounds of lack of jurisdiction in the sovereign, and hence lack of jurisdiction in the courts of that sovereign.

[3] See Jellenik *v.* Huron Copper Co., 177 U. S. 1, 13; Matter of Bronson, 150 N. Y. 1, 8, 44 N. E. 707, 709. See 25 HARV. L. REV. 719.

but the theory is so clearly erroneous, involving as it does an utter disregard of the corporate entity, that it has had no real currency in our law and need not be considered.

Another more tenable suggestion is that the share is a property interest in the legal unit, in the corporate entity itself. The French notion of collective property is perhaps responsible for this idea.[4] Under this theory, the *property* devoted to an enterprise is emphasized. It is looked upon as a unit, dedicated to this particular business by the contributors and collectively owned by them. The corporate entity when raised is regarded as a legal unit created to own and manage more efficiently the collective unit of property, — in essence, a legal unit predicated upon the collective property. Where this view is held, the above analysis of the nature of a share of stock is very applicable. But where, as with us, the legal entity is regarded as predicated upon the group of persons or person, there is more difficulty with the idea.

If a share of stock is so regarded, however, the question of jurisdiction to adjudicate its ownership becomes comparatively simple. No sovereign can have jurisdiction of the property but the sovereign of the territory where the property is.[5] The legal entity, the corporation, can have no existence except at the place where it was created.[6] So that this sovereign only should have jurisdiction to adjudicate its ownership.[7]

Perhaps the most logical explanation of the nature of a share of corporate stock in our law, and the one most commonly accepted, is that the share of stock is a *chose* in action of a complicated character — an obligor-obligee relation between the corporate entity and the shareholder. Taking this view the question of jurisdiction assumes a more difficult aspect.

Let us look at a simple *chose* in action — a contract by R. to pay money to E., unevidenced by any instrument. A clear and constant recognition of the nature of a *chose* in action is essential to reach any true result. In our simple case above, E., the obligee, has a legal right against R., the obligor, to have R. pay him money, and R. on his side has a legal duty to pay the money to E. This is the totality of the legal situation. When a court assumes to adjudicate that E. no longer has this right against R., but that R. is now so obligated to X., or, to speak loosely, to adjudicate the "ownership" of the debt, what is it doing? It is adjudicating two things, — that there is a legal obligation upon R., and that E. has been divested of a legal right. Now in a situation where R. is domiciled in state A. and physically there, and E. is domiciled in state B. and physically there, what state has jurisdiction to adjudicate as suggested above?

---

[4] PLANIOL, DROIT CIVIL, §§ 3005 *et seq.*

[5] See Arndt *v.* Griggs, 134 U. S. 316, 323; 3 BEALE, CASES ON CONFLICT OF LAWS, SUMMARY, § 37.

[6] See Shepard & Morse Lumber Co. *v.* Burleigh, 27 App. Div. 99, 101, 50 N. Y. Supp. 135, 136; 2 MORAWETZ, PRIVATE CORPORATIONS, § 959. The intangible nature of this property offers no objection to its having a *situs*. There are many examples where intangible property may properly be said to be situated at a certain place, *e. g.*, good will of a business. If there has been an incorporation by other states, then the question becomes more difficult.

[7] The purchase of shares of stock, in a corporation of a certain state, would be sufficient consent by a non-resident owner to subject his interest to the jurisdiction of that state.

According to all established principles of international law no sovereign has jurisdiction to adjudicate that there is a legal duty upon a person, unless it has some control, some "hold," over the person,[8] or the person has consented to the jurisdiction of the state; correspondingly, on the other side of the obligation, no state has jurisdiction to adjudicate the divestment of a legal right unless it has some "hold" or there has been consent.[9]

In our supposititious case, then, only state A. could validly adjudicate that a legal duty rested upon R. and only state B. that E. was divested of his right. Neither state has jurisdiction to make an adjudication that E. no longer has a right against R., but that X. has acquired one.[10]

It follows that any inquiries as to what court has "jurisdiction of the debt" and as to the "*situs* of the debt" are entirely inappropriate in seeking to determine the existence of jurisdiction to adjudicate the "ownership" of the debt. Their currency in the books in discussions of this matter is the result of an attempt to treat a *chose* in action as a locally existent *res*, for the purpose of conflicts. The use of such language when the case clearly depends upon jurisdiction of the person, tends to confuse and should be avoided.[11]

On the hypothesis that a share of stock in a corporation is a *chose* in action, the principles applicable to the simple example above should equally apply to the share unless it has some peculiar attributes which would lead to a different result. A corporate share is a very complicated *chose* in action. It is not a right to a definite sum of money, but rather to a proportionate share of the assets of the company, whatever they may be, upon dissolution. There are in addition certain incidental rights and duties appended to the relation.[12] Again, the stock is represented by a certificate, often negotiable, a mercantile specialty, which is generally in current use in commercial transactions.

First, as to the fact that the *chose* in action is not for a definite amount,

---

[8] Buchanan *v.* Rucker, 9 East 192; Pennoyer *v.* Neff, 95 U. S. 714. This "hold" may arise from physical presence, residence, domicil, or nationality.

In garnishment cases the necessity for jurisdiction of the debtor's debtor in order to make a valid judgment *quasi-in-rem* has been recognized. Chicago, etc. Ry. *v.* Sturm, 174 U. S. 710; McKinney *v.* Mills, 80 Minn. 478, 83 N. W. 452; Strauss *v.* Chicago Glycerine Co., 108 N. Y. 654, 15 N. E. 444; Harris *v.* Balk, 198 U. S. 215. *Contra*, High *v.* Padrosa, 119 Ga. 648, 46 S. E. 859.

[9] Mahr *v.* Norwich U. F. I. Society, 127 N. Y. 452, 28 N. E. 391. See, however, Harris *v.* Balk, 198 U. S. 215, where the Supreme Court of the United States recognized no such requirement for jurisdiction in a garnishment suit. This case seems incapable of support.

[10] It might be argued that, if the obligor lived in state A. at the time the contract was made and the obligee knew of this, he consented that his right should be dealt with by state A. But it seems clear that there is no actual consent in such a case.

If the question is one merely of adjudicating that a duty rests upon a person and no question of divesting a right, jurisdiction of the obligor is sufficient. See *infra*, note 22.

For a discussion of this entire matter, see Beale, "Jurisdiction in Rem to Compel Payment of a Debt," 27 HARV. L. REV. 107.

[11] The tendency to identify the question of jurisdiction to tax a *chose* in action and jurisdiction to adjudicate its ownership has added to the confusion. See *infra*, note 23.

[12] *E. g.*, the right to dividends, the right to have the assets of the corporation properly conserved. For a full description of the incidents of a share of stock, see 1 MORAWETZ, CORPORATIONS, §§ 235 *et seq.*

and as to the added rights and duties. None of these change the essential obligor-obligee nature of the relation, and as it is upon this that the principles governing the simple contract rest, these added features do not affect the applicability of the principles to the share of stock.

Next as to the certificate. This is merely evidence of the right.[13] In no sense is the obligation merged in the paper and thus to be treated as a chattel — the underlying obligor-obligee relation is not affected and so the principles evolved above apply. Hence the sovereign within whose territory the certificate lies has jurisdiction of the paper and can transfer the ownership of it.[14] This in many cases amounts in the ultimate to a transfer of the stock, for by the law of most states a rightful holder of a negotiable certificate properly indorsed has a power of attorney to effect a novation in accord with the company's initial agreement.[15] The judicial transfer will of course be recognized as rightful,[16] so that by the law of the proper sovereign, the transfer of the certificate will give the holder a good power of attorney which will be recognized by the sovereign having jurisdiction of the corporation. The corporation can thus be forced to make a transfer of the stock on its books, which will complete a novation. Thus an attachment or judicial sale of such a certificate will in the ultimate work a perfectly good attachment or sale of the stock. Nothing more than jurisdiction of the paper is necessary.[17]

The cases holding the attachment or judicial sale of a certificate of stock in a foreign corporation valid, can often be explained in this way.[18] The frequency of this power, through jurisdiction of the paper, validly to obtain the identical result which could have been obtained through jurisdiction to adjudicate the ownership of the stock has led to some confusion and misunderstanding of these cases. They have been cited as authority for the proposition that presence of the certificate gives jurisdiction of the stock, whereas they stand for nothing more than the

---

[13] The transfer of the certificate does not generally effect a complete novation as in the case of a negotiable promissory note or bill of exchange. In the usual case the share of stock may be said to include an agreement of the corporation with the primary purchaser, to effect a novation upon proper application and a surrender of the certificate. The transfer of the certificate properly indorsed gives a power of attorney to the transferee to apply for the novation, which is completed by a transfer upon the books of the corporation. Where words of negotiability are present in the power of attorney it is generally given the attributes of a negotiable instrument.

[14] If the owner of the stock is not within the jurisdiction, his consent to subject his interest to the jurisdiction of this sovereign must of course be found.

[15] See *ante*, note 13. In this analysis we are assuming a share of stock of the usual kind. Were the stock fully transferable by a transfer of the certificate as is sometimes the case, then the machinery would be the same as in the case of a bill or note. See *infra*, note 17.

[16] See Alcock *v.* Smith, [1892] 1 Ch. 238.

[17] *Cf.* William *v.* Colonial Bank, 38 Ch. Div. 388, 399.

The same situation exists in the case of promissory notes and bills of exchange. See Alcock *v.* Smith, [1892] 1 Ch. 238. The machinery by which the result is reached is a bit different, however. The rightful holder of a bill or note properly indorsed has become the obligee; a novation has been completely effected. Where the certificates are not negotiable, or not properly indorsed, the attachment or judicial transfer of the paper would probably have no resultant effect on the *chose* in action. This would, of course, depend upon the law of the proper sovereign.

[18] See Merritt *v.* American Barge Co., 79 Fed. 228; Blake *v.* Foreman Bros. Banking Co., 218 Fed. 264.

eminently true proposition that the presence of the paper gives jurisdiction over it.[19]

There is nothing, then, in the mechanical features of a share of stock which so differentiates it from an ordinary *chose* in action that different principles should apply. There remains to be considered mercantile policy. A certificate of stock is a mercantile specialty, in use continually in commercial transactions. Should, then, mercantile policy lead the courts to depart from the rules which should logically govern such a mechanism, and hold that where the certificate is, there is jurisdiction of the stock? Such a result would perhaps be favorable to commercial certainty, but in any event a change in the rules of jurisdiction is scarcely the proper means to the end. A rule of conflicts inconsistent with the nature of the rights involved can lead only to confusion.[20]

Upon the assumption then that stock in a corporation is a *chose* in action, on strict logical principles, jurisdiction of the corporation is necessary to adjudicate the ownership of the stock,[21] and if the divestment of a shareholder's right is being adjudicated jurisdiction of the shareholder is also necessary.[22]

The cases generally hold indiscriminately that only the sovereign where the corporation is created has jurisdiction to adjudicate the ownership of the stock.[23] This result can only be justified upon one of two

[19] See Beal *v.* Carpenter, 235 Fed. 273. For a discussion of this case, see *infra*, note 20.

[20] The theory adopted as to the nature of a share of stock would of course be immaterial if the mercantile view were taken. Where the certificate is, there would be jurisdiction of the stock, regardless of the nature of the stock.

In a recent decision, a federal court has seemingly taken this mercantile view. Beal *v.* Carpenter, 235 Fed. 273. The court there held that the purchaser at a judicial sale of certificates in a joint stock company whose assets were situated in a foreign jurisdiction, could force the company to transfer the stock to him upon the books of the company. The court placed its decision squarely upon the grounds that jurisdiction of the certificates gave jurisdiction of the interest which they represented. As it does not appear that the certificates were indorsed so as to give a power of attorney upon transfer, the case seems to go clearly on the grounds of commercial policy. Stock in a joint stock company is really a proportionate property interest in the assets of the company, and upon ordinary principles, only the sovereign where the property is should have jurisdiction to make a judicial sale of it. The case cites the federal cases noted *ante*, note 18, as authority; but these, as has been seen, may be explained upon a different principle. In addition, the decision rests itself upon the authority of the cases which allow the sovereign in whose territory a certificate of corporate stock is situated to tax the stock. The confusion of jurisdiction for taxation purposes with jurisdiction for purposes of adjudication has done much harm. Jurisdiction for the latter purpose does not follow from the existence of jurisdiction for the former. The validity of any taxation rests upon a *quid pro quo* principle. If the state furnishes protection to any property having value, it may tax it. The stock certificate is in constant use as a means of transferring the stock. A sale of the certificate means a sale of the stock. The certificate is the currency for the stock. It has commercial value up to the value of the stock. The state where it is gives it the protection of its laws, and there would seem to be no reason why it should not lay a tax upon it in return.

[21] This jurisdiction may be obtained by consent, so that any state in which a corporation was doing business under a statute which provided for a method of suit would have jurisdiction to adjudicate such a duty upon it.

[22] In the principal case the shareholder is dead, so that there is no question of adjudicating a divestment of his right.

[23] Jellenik *v.* Huron Copper Mining Co., 177 U. S. 1; Sohege *v.* Singer Mfg. Co., 73 N. J. Eq. 567, 68 Atl. 64; Barber *v.* Morgan, 84 Conn. 618, 80 Atl. 791.

The cases holding the taxation of stock at the place where the certificate is, and at

grounds, that the stock is viewed as a share in the corporation — the legal entity; or, taking the *chose* in action theory, as a rule of convenience to overcome the difficulty of getting the corporation and the shareholder together.[24] It is difficult to discover upon what reasoning the courts proceed. Too often they say that the *situs* of the stock is here or there, and go no further into the question.[25]

THE USE OF THE POWER OVER INTERSTATE COMMERCE FOR POLICE PURPOSES. — Does the power to regulate commerce between the several states include the power to use such regulations to promote the general welfare, or is the use restricted to securing merely the prosperity of that commerce? Only within recent years has this question been authoritatively answered. The first case [1] in which there was presented a regulation of interstate commerce to achieve what may be briefly designated a police purpose was the Lottery Case [2] in 1902. There a federal statute prohibiting the interstate shipment of lottery tickets by common carrier was sustained. Then the Pure Food and Drug Act,[3] the White Slave Act,[4] and the Lacey Act,[5] barring from interstate commerce game taken or killed contrary to the law of a state, were in turn upheld. Also a statute excluding from interstate and foreign commerce "movie" films of prize fights was approved in cases arising under foreign commerce.[6] On January 8, 1917, the Supreme Court sustained the Webb-Kenyon Law forbidding the shipment of liquor into a state in violation of any

---

the domicil of the owner valid, are often cited as authorities on this matter, but wrongly, as they depend on entirely different principles. The power to tax at the *locus* of the certificate we have spoken of *ante*, note 20. The cases apparently upholding a tax of the stock at the domicil of the owner can be explained on the grounds that the tax is a personal tax, scaled to the individual power to pay. The stock is taken into consideration as one of the assets in determining the power to pay. Such a tax is perfectly valid.

[24] There is something to be said for the latter as a rule of expediency, though it is contrary to the recognized principles of international law to adjudicate the right of a person without jurisdiction of the person. *Cf.* the garnishment case, Harris *v.* Balk, 198 U. S. 215.

Clearly if jurisdiction of the shareholder is not to be required it is better to be thoroughly illogical and limit the jurisdiction to the domicil of the corporation rather than to extend it to all states where the corporation has consented to be sued.

[25] The principal case clearly seems to adopt the *chose* in action theory. It is to be regretted that the facts called for no decision as to the necessity of jurisdiction of the shareholder also.

[1] It is true that early in the nineteenth century embargoes were used for retaliation, but these applied only to foreign commerce, and are omitted from consideration in order to avoid raising the question of the relative scope of the power over foreign and interstate commerce.

[2] Champion *v.* Ames, 188 U. S. 321. See Paul Fuller, "Is there a Federal Police Power?," 4 COL. L. REV. 563. United States *v.* Popper, 98 Fed. 423, a district court decision in 1899, had upheld the exclusion from interstate commerce of medical devices intended for an immoral use.

[3] Hipolite Egg Co. *v.* United States, 220 U. S. 45.

[4] Hoke *v.* United States, 227 U. S. 308.

[5] Rupert *v.* United States, 181 Fed. 87. See Silz *v.* Hesterberg, 211 U. S. 31, 44.

[6] Weber *v.* Freed, 239 U. S. 325.